04/08/1996

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April 8, 1996

Re: C. A. No. CV95-2115S; *Crystal Oil Company and Crystal Exploration and Production Company v. Atlantic Richfield Company*; In the United States District Court for the Western District of Louisiana, Shreveport Division

---

Mr. Robert H. Shemwell
United States District Clerk
300 Fannin, Suite 1167
Shreveport, Louisiana 71101

VIA MESSENGER

Dear Mr. Shemwell:

Enclosed please find for filing the original and one copy of the following:

(1) **Plaintiffs' Response in Opposition to Defendant's Motion to Transfer Venue;** and

(2) **Plaintiffs' Memorandum in Opposition to Defendant's Motion to Transfer Venue.**

Please file stamp the extra copies of these pleadings and return them to our messenger as proof of filing.

Plaintiffs respectfully request an opportunity to present argument at an oral hearing on the venue issue.

Thank you for your assistance in this matter.

Very truly yours,

Osborne J. Dykes

Osborne J. Dykes, III

OJD/ljs
Enclosures

628398

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CRYSTAL OIL COMPANY AND CRYSTAL EXPLORATION AND PRODUCTION COMPANY,	§	CASE NO. CV95-2115S
Plaintiffs,	§	
vs.	§	JUDGE STAGG
ATLANTIC RICHFIELD COMPANY,	§	
Defendant.	§	MAGISTRATE JUDGE PAYNE

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE

Plaintiffs Crystal Oil Company ("Crystal") and Crystal Exploration and Production Company ("CEPCO") file this response in opposition to Atlantic Richfield Company's ("ARCO") motion to transfer venue.

1.

This Court, through its bankruptcy unit, entered the Order Confirming Crystal's Plan of Reorganization in 1986. Federal law mandates that this Court must decide the threshold issue in this case, whether Crystal's bankruptcy discharge bars the claims ARCO now asserts against it.

2.

Under 28 U.S.C. § 1404(a) (1994), ARCO's motion should be denied because ARCO has failed to show that the convenience of the parties and witnesses would call for transfer.

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3.

Plaintiffs adopt and incorporate by reference Plaintiffs' Memorandum in Opposition to Defendant's Motion to Transfer Venue which is filed concurrently herewith.

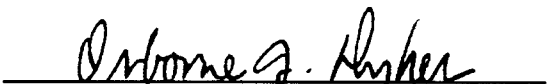
4.

Plaintiffs respectfully request an opportunity to present argument at an oral hearing on the venue issue.

PRAYER

Plaintiffs Crystal Oil Company and Crystal Exploration and Production Company pray that this Court deny ARCO's motion to transfer venue to the United States District Court for the District of Colorado. Plaintiffs ask for such other and further relief to which they may be justly entitled.

FULBRIGHT & JAWORSKI L.L.P.



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CERTIFICATE OF SERVICE

In compliance with the Federal Rules of Civil Procedure, this pleading was served on the following counsel of record by First Class U.S. Mail on April 4, 1996 at the addresses indicated:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CRYSTAL OIL COMPANY, AND CRYSTAL EXPLORATION AND PRODUCTION COMPANY,	§	Civil Action No. CV 95-2115S
Plaintiffs	§	JUDGE TOM STAGG
v.	§	MAGISTRATE JUDGE PAYNE
ATLANTIC RICHFIELD COMPANY,	§	
Defendant	§	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE

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ATTORNEYS FOR PLAINTIFFS

April 4, 1996

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

MISCELLANEOUS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CRYSTAL OIL COMPANY, AND CRYSTAL EXPLORATION AND PRODUCTION COMPANY,	§	Civil Action No. CV 95-2115S
Plaintiffs	§	JUDGE TOM STAGG
v.	§	MAGISTRATE JUDGE PAYNE
ATLANTIC RICHFIELD COMPANY,	§	
Defendant	§	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE

Plaintiffs Crystal Oil Company ("Crystal") and Crystal Exploration and Production Company ("CEPCO") file this memorandum in opposition to defendant Atlantic Richfield Company's ("ARCO") motion to transfer venue.

FACTUAL BACKGROUND

In 1995, ARCO notified Crystal that it intended to seek recovery of environmental cleanup costs at the Rico-Argentine mine in Dolores County, Colorado (the "Environmental Claim"). The mine was formerly owned by CEPCO, a wholly owned subsidiary of Crystal. ARCO maintains that Crystal is liable under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* (1994) ("CERCLA") for cleanup activities even though (1) any such claim against Crystal is barred by Crystal's 1986 discharge in bankruptcy and (2) ARCO's predecessor (Anaconda) contracted with CEPCO to take responsibility for any environmental cleanup costs relating to the property. On November 30, 1995, Crystal and CEPCO filed suit in this Court asking for a declaration that they have no liability to ARCO for remediation of the mine.

History of Ownership of the Rico Mine. Beginning in the early 1900s, a Utah corporation named Rico-Argentine Mining Company conducted mining operations in and near Rico, Colorado. CEPCO, a wholly-owned subsidiary of Crystal, became the owner of the Rico mine in 1977 through a series of corporate mergers. Crystal itself never owned the mine. In June 1978, The Anaconda Company ("Anaconda"), a wholly-owned subsidiary of ARCO, entered into an option agreement with CEPCO to explore and possibly purchase the Rico mine. *See* June 1, 1978 Agreement and Amendment No. 1 thereto (the "Option Agreement"), Appendix, Tab A. Anaconda bought the mine on August 27, 1980, and the sale was memorialized in a letter agreement dated June 17, 1980 and in a Closing Agreement. *See* June 17, 1980 letter agreement and August 27, 1980 Closing Agreement, Appendix, Tab B. The Option Agreement was terminated by an Acknowledgement of Termination in conjunction with such purchase on August 27, 1980. *See* August 27, 1980 Acknowledgement of Termination, Appendix, Tab C. Anaconda later merged into ARCO and all references hereafter are therefore to ARCO, which includes its predecessors.

The Parties' Agreement Concerning Responsibility for Post-Closing Cleanup Liability. The Closing Agreement expressly addressed the allocation of environmental responsibilities in clear and unambiguous language, contractually absolving CEPCO from all obligations and responsibilities with one limited exception. The parties were aware of alleged water permit violations which would probably result in penalties and enforcement actions after closing. With respect to this one potential liability, ARCO and CEPCO agreed that CEPCO would be responsible only for pre-closing violations up to a maximum of $30,000.00. Otherwise, the Closing Agreement reflected the parties' understanding—ARCO would have full responsibility for all penalties, enforcement actions, and other costs, including post-closing cleanup:

> Anaconda [now ARCO] shall be solely and fully responsible for any and all compliance requirements imposed, in response to permit violations which occur either before or after August 27, 1980, by either the Colorado Department of Health or EPA, including, without limitation, cleanup orders or the installation of pollution control facilities, devices, plans or programs. In no event shall Crystal be liable for or subject to, either directly or indirectly, any such compliance costs or requirements.

See Closing Agreement at 2-4 (emphasis added), Appendix, Tab B. Most importantly, the parties (ARCO and CEPCO) further agreed that CEPCO would have no other post-closing responsibility for the Rico property:

> Crystal shall not be subject to any other obligations or responsibilities with respect to the properties involved in this transaction subsequent to closing, except as otherwise specified in this Closing Agreement.

See Closing Agreement at 12, Appendix, Tab B.

Discharge In Bankruptcy. On October 1, 1986, Crystal filed a petition initiating a case under Chapter 11 of the Bankruptcy Code (the "Bankruptcy Case") in the United States Bankruptcy Court for the Western District of Louisiana in Shreveport, Louisiana (the "Bankruptcy Court"). On the same date, the Bankruptcy Court signed and filed its Order Fixing a Meeting of Creditors; An October 31, 1986 General Bar Date . . . . And Specifying Form and Manner of Notice (the "Bar Order"). *See* Bar Order, Appendix, Tab D. The Bar Order required that any claim that arose, or was deemed to have arisen, prior to October 1, 1986, must be filed no later than October 31, 1986:

> after which no such Claims may be filed or asserted against the property of Crystal or may participate in any plan for the reorganization, and will be bound by the terms of any plan of reorganization if the plan is confirmed by this Court.

ARCO had actual notice of the Bankruptcy Case and was represented by counsel at various hearings in the Bankruptcy Case. Indeed, ARCO filed a proof of claim in the Bankruptcy Case within the time set by the Bar Order. That proof of claim made no

mention of the Environmental Claim, even though ARCO was then aware of the environmental problems that existed with respect to the Rico property.

As early as 1982, ARCO conducted remedial work at the mine to stabilize the tailing ponds and prevent contaminated runoff into the adjacent Silver Creek. *See* November 1995 Voluntary Cleanup Plan Application for the Argentine Tailings Site, at 2-3 and 2-12, Appendix, Tab E. This action necessarily shows awareness of environmental problems associated with the tailing at the mine.

By mid-1985, over a year before Crystal's October 1986 bankruptcy filing, the Environmental Protection Agency ("EPA") directed a contractor to conduct an initial investigation at the mine of potential releases in violation of CERCLA. ARCO gave the EPA permission to enter the Rico mine to do this study. This permission as well as receipt of the report compiled after this study, demonstrates that ARCO was clearly on notice of a contingent environmental cleanup claim against it, and thus a possible contingent claim by it against others, for contribution. *See* CH_2M Hill Ecology & Environment Report, dated July 29, 1985 (the "1985 Report"), Appendix, Tab F.[1/]

On November 10, 1986, the Bankruptcy Court entered an Order Approving Crystal's Disclosure Statement for its Plan (the "Disclosure Statement Order" and the "Plan of Reorganization"). The Disclosure Statement Order set the date for the hearing to consider whether Crystal's Plan of Reorganization should be confirmed and the date by which any holder of a claim must object to that confirmation, if it chose to do so. ARCO, as a creditor having appeared in the case and filed a proof of claim, received

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[1/] As evidenced by its 1976 Proxy Statement pursuant to which ARCO acquired Anaconda, Anaconda knew that environmental issues relating to the operations of mines could be quite costly. Anaconda had spent between $15 million to $40 million annually on environmental matters between 1973 and 1976. *See* September 15, 1976 Proxy Statement at 87-89, Appendix, Tab G. Plaintiffs believe that discovery will confirm a high degree of environmental sophistication on the part of Anaconda and ARCO generally, and a clear awareness of the environmental problems at the Rico property specifically, well before Crystal's 1986 bankruptcy.

these notices. On December 31, 1986, the Bankruptcy Court entered an Order Confirming Crystal's Plan of Reorganization (the "Confirmation Order"). *See* Confirmation Order, Appendix, Tab H. The Confirmation Order discharged all claims against Crystal arising before the beginning of its Bankruptcy Case.

The Filing of This Suit. ARCO has made a claim (and orally admitted that it is a claim in excess of $20 million) for contribution from Crystal and CEPCO for remediation costs. Crystal and CEPCO have filed suit asking this Court to declare that (1) Crystal discharged any liability through the bankruptcy proceedings initiated in 1986; and (2) CEPCO and ARCO expressly contracted to allocate to ARCO all post-closing obligations and responsibilities as to the property, which would include environmental cleanup costs. These are the two threshold issues in this case.

SUMMARY OF THE ARGUMENT

Crystal and CEPCO filed suit in this Court because they believe ARCO has violated the injunction which arises from Crystal's discharge in bankruptcy granted by this Court. This Court, through its bankruptcy unit, entered the Confirmation Order in 1986, and federal law mandates that this Court must decide the threshold issue of Crystal's bankruptcy discharge.

ARCO's assertion of the Environmental Claim against Crystal violates both the discharge injunction under § 524 of the Bankruptcy Code and the well established rule that persons subject to an injunctive order are expected to obey the injunction unless and until it is modified or reversed by the entering court. Therefore, this Court, or its bankruptcy unit, is the only Court that can determine the foremost issue in this case: whether to enforce or modify the § 524 injunction that was activated by the Confirmation Order. Section 524 of the Code provides that a judgment obtained on a discharged claim is void. Consequently, it would be a tremendous waste of judicial

resources to try the ARCO Environmental Claim without first determining whether any judgment against Crystal on that claim would be void.

Ignoring the controlling importance of the bankruptcy laws for the venue issue in this case, ARCO relies in its motion solely upon 28 U.S.C. § 1404(a) (1994). ARCO has wholly failed, however, to meet its heavy burden of showing that the convenience of the parties and witnesses would call for transfer in the interest of justice.

Crystal and CEPCO did not choose to litigate in this forum arbitrarily or for any improper purpose. Instead, plaintiffs chose this forum because this Court is best qualified to enforce and apply its own discharge orders, particularly those arising from Crystal's complex and precedent-setting bankruptcy, which is still cited in legal and business journals. *See, e.g.*, E. Tashjian et al., *Prepacks: An Empirical Analysis of Prepackaged Bankruptcies*, 40 Journal of Financial Economics 135, 136 (1996) (Crystal's 1986 bankruptcy is recognized as the first "prepackaged" bankruptcy under the Bankruptcy Act of 1978), Appendix, Tab I. Moreover, Crystal and CEPCO both reside in Shreveport. Shreveport is the most convenient forum to decide the contract issues as to CEPCO and Crystal. All of Crystal and CEPCO's documents are here, many potentially key witnesses reside here, and no key witnesses have been shown to reside in Colorado. Consequently, Crystal's forum choice in this case should control.

ARCO attempts to recharacterize this case as a complicated cost recovery case involving intensely Colorado-based facts and law. That is not what comes first in this case, however. Before this Court ever gets to those issues, it must first determine two threshold issues—whether Crystal and CEPCO's liability to ARCO is cut off by bankruptcy discharge or by contract. No other parties are necessary to these threshold determinations, nor do they require an abundance of Colorado evidence. The hypothetical cost recovery case on which ARCO bases its motion to transfer venue is

at best a case for another day. That case may or may not be filed. If it is, it may involve other parties, but it should not involve ARCO's claims against Crystal or CEPCO.

ARGUMENT AND AUTHORITIES

I. CRYSTAL CHOSE THE FORUM THAT MUST DECIDE THE THRESHOLD ISSUE IN THIS CASE: WHETHER CRYSTAL WAS DISCHARGED BY THE BANKRUPTCY COURT'S 1986 CONFIRMATION ORDER

Upon entry by the Bankruptcy Court for this district of the Confirmation Order, without ARCO having filed a proof of its alleged Environmental Claim, Crystal received (1) a discharge of that claim, and (2) an injunction under § 524 of the Bankruptcy Code against efforts to collect it. ARCO incorrectly asserts in its memorandum that "the fact that the original bankruptcy proceeding took place in Louisiana carries little weight." *See* ARCO's Memorandum at 17. Instead, federal law dictates that only this Court, or its bankruptcy unit which administered Crystal's Chapter 11 case, should modify or enforce this § 524 discharge injunction.

A. Crystal Seeks Enforcement of Orders of a Unit of this Court

The Complaint asks this Court to enforce the Confirmation Order which provides that all "claims" against Crystal are discharged. (Complaint ¶¶ 23-32).[2/] The Confirmation Order dated December 31, 1986, granted Crystal the following discharge:

> It is further ORDERED, ADJUDGED, AND DECREED that the provisions of the Plan shall bind all creditors and interest holders, whether or not they have accepted the Plan, and shall discharge Crystal from all debts that arose before October 1, 1986, and that the distributions provided for under the Plan shall be in exchange for and in complete satisfaction, discharge, and release of all claims against and interests in Crystal or any of its assets or properties, including any claim or interest accruing after October 1, 1986, and prior to the Effective Date;

[2/] ARCO's assertion of the Environmental Claim also violates the Bar Order which required ARCO to file this claim in the Bankruptcy Case before October 31, 1986.

* * *

> It is further ORDERED, ADJUDGED, and DECREED that as of the Effective Date all property of Crystal shall be free and clear of all claims and interests of creditors and equity security holders, except for obligations imposed under the Plan;

(Emphasis added). *See* Confirmation Order at 16-17, Appendix, Tab H.

Section 1141 of the Bankruptcy Code (the "Code") provides that confirmation of a plan of reorganization discharges the debtor from any "debt" that arose before the date of such confirmation. 11 U.S.C. § 1141 (1994). The Code defines a "debt" to mean liability on a "claim," which is very broadly defined to mean "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. §§ 101(5), (12) (1994). After the 1982 remediation work Anaconda did at the mine, and the 1985 Report, ARCO clearly knew in 1986 that it had a contingent claim against Crystal for remediation contribution—even giving ARCO the benefit of the doubt that it had not focused on the fact that its claim was independently barred by contract.

Sections 524(a)(2) and (3) of the Code provide that a "discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action. . . . [or] an act, to collect, recover or offset any such debt . . . ." 11 U.S.C. § 524 (1994). The purpose of the § 524 injunction is clear—to stop creditors from pursuing claims that have been discharged. Crystal requests that this Court find that the Environmental Claim ARCO now asserts against Crystal is a "claim" and enforce the § 524 discharge injunction.

B. ARCO's Pursuit of Alleged Environmental Claims Against Crystal In Another Court Would Violate the § 524 Discharge Injunction

Crystal's discharge injunction may be modified (or enforced) only by the entering court (the United States Bankruptcy Court for the Western District of Louisiana, Shreveport Division) or by this District Court, of which the Bankruptcy Court is a unit and which has the discretionary power to withdraw any reference from the Bankruptcy Court. By asserting the Environmental Claim against Crystal (even though it was known at the time of Crystal's bankruptcy), ARCO has violated the § 524 discharge injunction. By clearly indicating its intention to bring an action against Crystal in Colorado without the prior permission from the issuing court, ARCO has taken "an act . . . to collect [a discharged] debt." 11 U.S.C.§ 524 (1994). This violated the well-established rule that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed [by the entering court or on appeal], even if they have proper grounds to object to that order." *Celotex v. Edwards*, ___ U.S. ___, 115 S.Ct. 1493, 1498 (1995) (citing *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386 (1980)).

The Supreme Court in *Celotex* emphasized that the place to seek relief from a bankruptcy court injunction is the bankruptcy court which issued it. 115 S.Ct at 1501.[3/] The respondents in *Celotex* had chosen instead to collaterally attack the

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[3/] It is well established that the bankruptcy court presiding over a debtor's case is the only court that has authority to lift the stay of § 362 of the Bankruptcy Code, which comes into effect automatically when a debtor files a petition in bankruptcy, just as the § 524 discharge injunction comes into effect automatically when a confirmation order is entered. *See, e.g., Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 62 (6th Cir. 1983).

> The legislative history of § 362(d) unambiguously identifies the bankruptcy court as the exclusive authority to grant relief from a stay. . . . *In re Related Asbestos Cases*, 23 B.R. 523, 526 (N.D. Cal. 1982) ("the original bankruptcy courts alone should be exclusive power to lift an actual stay under § 362").

The § 105 injunction in *Celotex* was entered expressly to supplement the protection of the § 362 automatic stay. The discharge injunction of § 524 is the post-confirmation corollary of the § 362

§ 105(a) injunction entered by a Florida bankruptcy court in a Texas federal court. *Id.* at 1496. The Supreme Court held that they could "not be permitted to do [this] without seriously undercutting the orderly process of the law." *Id.* at 1501. Indeed, if a party, like ARCO, violates a § 524 discharge injunction, without prior permission from the court which issued it, that party may be subject to sanctions for contempt. *See, e.g., In re Texaco, Inc.*, 182 B.R. 937 (Bankr. S.D.N.Y. 1995). Consequently, this Court or its bankruptcy unit, not some other court, must consider whether ARCO should be permitted to pursue a claim which was discharged.

C. This Court Has Jurisdiction to Apply and Enforce Crystal's Confirmation Order

This Court plainly has jurisdiction to apply and enforce Crystal's Confirmation Order. This District Court has original but not exclusive jurisdiction of all civil proceedings, arising under, arising in or related to cases under title 11 of the Code. 28 U.S.C. § 1334 (a), (b) (1994). The Bankruptcy Court which entered the Confirmation Order is a unit of this Court. 28 U.S.C. § 151 (1994) ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."). This Court has discretion to refer cases to the Bankruptcy Court, 28 U.S.C. § 157(a), (b) (1994), or to withdraw that reference from the Bankruptcy Court, in whole or in part. 28 U.S.C. § 157(d) (1994). Because Crystal's Confirmation Order is an order of a unit of this Court, this Court is best situated to apply that Order itself, or to refer that decision to its bankruptcy unit, if it chooses to do so.

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automatic stay which applies during the Bankruptcy Case.

D. This Court Is Best Situated to Enforce Orders Entered by Its Own Bankruptcy Court

A recent factually analogous decision in the Texaco reorganization case illustrates why this Court (or its bankruptcy unit) should decide whether the discharge injunction has been violated. In *In re Texaco Inc.*, 182 B.R. 937 (Bankr. S.D.N.Y. 1995), twenty Louisiana land owners instituted suit in a Louisiana state court alleging subsurface contamination from Texaco's salt water storage pits, five years after Texaco's Chapter 11 plan was confirmed and two years after the case was closed. Texaco asserted its bankruptcy discharge as an affirmative defense in state court, arguing that the claims had been discharged in its bankruptcy case. *Id.* at 942.

Texaco, however, also went to the bankruptcy court in New York which had administered its Chapter 11 case, and sought to hold the plaintiffs in contempt of that court for violating the discharge injunction of § 524 of the Code. The bankruptcy court overruled jurisdictional objections "[r]ecognizing that it is essential for a bankruptcy court to have jurisdiction to adjudicate controversies respecting, and to enforce, its own orders. . . ." *Id.* at 944. The bankruptcy court reasoned further that it had jurisdiction to decide violations of the § 524 discharge injunction because:

> In short, the express language of the Bankruptcy Code, the decided cases (other than the Ninth Circuit decision in *Sequoia Auto Brokers*), the express provisions of the Texaco Plan[4/] and sound considerations of

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4/ Retention of jurisdiction under Texaco's plan of reorganization was quite similar to the following found in Crystal's Plan of Reorganization under Article XI:

> The Bankruptcy Court further shall retain jurisdiction after the Consummation Date for the purpose of determination. . . of all causes of action, controversies, disputes, or conflicts, whether or not subject to any pending action as of the Confirmation Date, between Crystal and any other party, . . .
>
> * * *
>
> (c) to enforce and interpret the terms and conditions of this Plan;

> public policy compel the conclusion that a bankruptcy court has subject matter jurisdiction to enforce and *interpret* its own orders. This court has jurisdiction to entertain this motion to enforce the Texaco Plan as it relates to claims discharged under this Court's order confirming the Plan and 11 U.S.C. §§ 524 and 1141.

Texaco, 182 B.R. at 944 (emphasis added).

Texaco's opponents also argued that the bankruptcy court should abstain in favor of the prior pending state court action under both the mandatory and permissive abstention provisions of 28 U.S.C. § 1334(c)(1) and (2) (1994). *Id.* at 946. Mandatory abstention was clearly not applicable because Texaco's motion was based on the § 524 discharge injunction and the Confirmation Order, not on a state law cause of action. *Id.* As to permissive abstention, the court said, in language which also applies here to the ARCO venue transfer motion:

> I am not required to abstain from deciding issues which are of central importance to the integrity of the bankruptcy process.
>
> * * *
>
> . . . Because contempt is an affront to the court issuing the order, enforcement of an injunction through a contempt proceeding must occur in the issuing jurisdiction regardless of the state in which the alleged violation of the court order may have occurred. . . .

Texaco, 182 B.R. at 946-47 (emphasis added) (quoting *Hamilton Allied Corp. v. Kerkau Mfg. Co.*, 87 B.R. 43 (Bankr. S.D. Ohio 1988)); *see also Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986). The court went on

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> (d) to enter such Orders, including injunctions, as are necessary to enforce the title, rights, and powers of Reorganized Crystal and to impose such limitations, restrictions, terms, and conditions on such title, rights, and powers as this Bankruptcy Court may deem necessary;
>
> * * *
>
> (f) to correct any defect, cure any omission, or reconcile any inconsistency in this Plan or the Order of Confirmation as may be necessary to carry out the purposes and intent of this Plan;

(Emphasis added).

to hold that "[a] bankruptcy court is undoubtedly the best qualified to interpret and enforce its own orders including those providing for discharge and injunction and, therefore, should not abstain from doing so" absent extraordinary circumstances. *Texaco*, 182 B.R. at 947 (citing *In re Chicago, Milwaukee, St. Paul & Pac. Ry. Co.*, 6 F.3d 1184, 1185-86 (7th Cir. 1993)) (emphasis added).

As to the venue transfer motion, the *Texaco* court recognized that principles it had discussed concerning abstention support retention of venue by the court whose orders are to be interpreted and enforced:

> With respect to venue, Respondents do not claim that venue in this Court is not proper under 28 U.S.C. § 1408, but they assert that venue should be transferred to Louisiana because virtually all of the witnesses are located there and are not subject to subpoena in New York.
>
> The authorities cited and discussed above on the issue of abstention strongly support the proposition that the issuing court is in the best position to interpret and enforce its own orders. In this case, that precept is also applicable to the venue objection, given the unusual aspects of the unprecedented Texaco bankruptcy and the arguments advanced by counsel on the merits of this motion, discussed below. Moreover, a movant's choice of forum is entitled to some deference.

Id. at 948 (emphasis added); *see also In re Manville Forest Prod. Corp.*, 816 F.2d 1384, 1391 (2nd Cir. 1990) ("the district in which the underlying bankruptcy case is pending is presumed to be the appropriate district for hearing and determination of a proceeding in bankruptcy").

As demonstrated by the decisions in *Celotex* and *Texaco*, this Court should exercise its retained jurisdiction to apply and enforce the Confirmation Order and the § 524 injunction in this case.

II. UNDER 28 U.S.C. § 1404(a) THIS CASE SHOULD PROCEED IN LOUISIANA

Plaintiffs believe that the bankruptcy issue controls the venue in this case, as set out above. If and to the extent that a venue analysis under 28 U.S.C. § 1404(a) comes

into play, the convenience of parties and witnesses, in the interest of justice, also requires denial of ARCO's motion.

A. Under 28 U.S.C. § 1404(a), Plaintiffs' Louisiana Forum Choice Should be Given Paramount Consideration

The Western District of Louisiana is by far the most convenient forum to Crystal and is also a convenient forum for ARCO. Crystal is a Louisiana corporation with its principal place of business in Shreveport. CEPCO's principal place of business is also Shreveport, although CEPCO no longer has substantial business operations. Crystal's 1986 bankruptcy was filed and concluded in the Western District of Louisiana. Not only are many of Crystal's witnesses and virtually all of its documents located here, but this case has a strong connection to this forum because it is based directly in part on the orders of the Bankruptcy Court. ARCO does substantial business and regularly litigates in the Western District of Louisiana. Thus, this forum is convenient to both parties.

When analyzing a defendant's motion to transfer venue under 28 U.S.C. § 1404(a), the Fifth Circuit has held that a plaintiff's forum choice is "highly esteemed" and accorded substantial weight, especially when, as here, the plaintiff brings its cause of action in its home forum, and the cause of action has a significant connection to that forum. *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989); *Menendez Rodriguez v. Pan Am. Life Ins. Co.*, 311 F.2d 429, 432 (5th Cir. 1962), *vacated on other grounds*, 376 U.S. 779 (1964); *see also Schutte v. Amoco Steel*, 431 F.2d 22, 25, (3rd Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). Courts should not disturb a plaintiff's forum choice absent a clear and convincing showing by the movant that the balance of convenience strongly favors an alternate forum. *Schutte*, 431 F.2d at 25; *Ayers v. Arabian Am. Oil Co.*, 571 F. Supp. 707, 709 (S.D.N.Y. 1983).

B. Application of the Relevant Factors Demonstrates That This Court Should Exercise its Discretion to Deny Transfer

In analyzing a motion to transfer venue under § 1404(a), the trial court must consider all relevant factors to determine whether or not on balance the litigation would more conveniently proceed, and the interest of justice be better served, by transferring to a different forum. 28 U.S.C. § 1404(a) (1994); *see also Peteet*, 868 F.2d at 1436. In determining whether, in the interest of justice, a transfer is warranted, this Court considers the same factors relevant to a *forum non conveniens* motion: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) cost of obtaining attendance of willing witnesses; (4) possibility of view of premises; (5) enforceability of a judgment; (6) docket congestion; (7) whether jury duty ought to be imposed on people of a community with no relation to the litigation; (8) trial by a court that is familiar with controlling law; and (9) all other practical problems that make trial of a case easy, expeditious, and inexpensive. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *see also Marbury-Pattillo Constr. Co. v. Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir. 1974). Where the balance of relevant factors is equal, or only slightly in favor of the movant, the transfer should be denied. *Houk v. Kimberly-Clark Corp.*, 613 F. Supp. 923, 927 (W.D. Mo. 1988).

1. Relative Ease of Access to Sources of Proof Does not Weigh in Favor of Transfer

In determining whether to transfer a case to another district, courts should consider the relative ease of access to sources of proof. This factor includes considerations such as convenience of specifically identified witnesses who will probably be called to testify at trial and availability of pertinent documents.

a. ARCO Has Failed to Show That Convenience of the Witnesses Favors Transfer

When a party seeks to transfer venue on the basis of witnesses' convenience, it is the burden of the movant to name the key witnesses who will be appearing and to describe their testimony so that the court can measure the inconvenience caused by locating a lawsuit in a particular forum. *Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *see also Marbury-Pattillo*, 490 F.2d at 158. "If the moving party merely makes a general allegation that witnesses will be necessary, without identifying those necessary witnesses and indicating what their testimony at trial will be, the motion to transfer based on convenience of witnesses will be denied." *Factors, Etc.*, 579 F.2d at 218; *Palm Tree, Inc. v. Stockment*, 488 F.2d 754, 756-57 (3rd Cir. 1973); *Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 148 (10th Cir. 1967); *Crawford & Co. v. Temple Drilling Co.*, 655 F. Supp. 279, 281 (M.D. La. 1987); *Clark v. Moran Towing & Trans. Co., Inc.*, 738 F. Supp. 1023, 1031-31 (E.D. La. 1990).

Broad assertions of witness inconvenience cannot support transfer. *Factors, Etc.*, 579 F.2d at 281; *Riso Kagako Corp. v. A.B. Dick Co.*, 300 F. Supp. 1007, 1010 (S.D.N.Y. 1969) (noting that primary element of adequate transfer motions is submission of an affidavit which details names and locations of potential witnesses and the substance of their testimony). ARCO has made sweeping general assertions that relevant witnesses who are likely to be defense witnesses may be located in Colorado, but (with two exceptions noted below) has failed to identify any such witnesses. Without such specific identification of witnesses and a description of their testimony, ARCO has wholly failed to support its claims concerning witness convenience.

ARCO has suggested that the testimony of two individuals, Ken Hubbard, Esq. and Davis O'Connor, Esq., who served as CEPCO's Denver counsel in 1980, might be

required at trial, presumably to supply parol evidence concerning the Closing Agreement. Plaintiffs believe that the Closing Agreement is plain and unambiguous and that neither the parties nor the Court should be burdened with unearthing and sifting through parol evidence. Even if parol evidence were to be admitted at trial, however, ARCO has named Messrs. Hubbard and O'Connor without interviewing them (*see* Affidavit of Osborne J. Dykes, III, Appendix, Tab J), and without any prediction or guess as to their probable testimony. Moreover, these gentlemen were CEPCO's lawyers in the transaction, and CEPCO has made no decision as to whether the testimony of its own lawyers will be relevant or needed in this proceeding.[5/] Beyond naming CEPCO's (not ARCO's) counsel as possible witnesses, ARCO has wholly (1) failed to identify any witnesses by name, (2) failed to identify which, if any, are "key" witnesses, (3) failed to identify where the key witnesses reside, and (4) failed to give any description of their testimony. Consequently, this Court should not accord weight to ARCO's allegation of inconvenience caused by proceeding in this forum.

Plaintiffs, on the other hand, have identified specific witnesses who reside outside Colorado and, where possible, the substance of the anticipated testimony. *See* Affidavit of Osborne J. Dykes, III, Appendix, Tab J.

b. Location of Relevant Documents Does not Weigh in Favor of Transfer

With the availability of photocopy machines, the location of documents in another district is generally accorded little weight in considering a motion to transfer, unless a special showing is made by the movant that the documents cannot be copied. *See, e.g., Standard Office Sys. of Fort Smith, Inc. v. Ricoh Corp.*, 742 F. Supp. 534, 538

[5/] If Crystal decides that its own lawyers should be witnesses, it will, of course, pay their expenses to Louisiana.

(W.D. Ark. 1990) (citing 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3851 at pp. 278-79 (1976)). ARCO has not attempted to make this showing. Furthermore, any documents of plaintiffs are located in Shreveport, their principal place of business. The documents relating to the Bankruptcy Case are voluminous and are all in Shreveport.

2. Availability of Compulsory Process for Attendance of Unwilling Witnesses Weighs in Favor of Plaintiffs' Forum Choice

If a witness is unwilling to appear at trial, and a given court has the power to compel that witness' appearance in person, the availability of compulsory process weighs in favor of the forum with that power. *E.g.*, *Kirschner Bros. Oil, Inc. v. Pannill*, 697 F. Supp. 804, 808 (D. Del. 1988). In its Memorandum, ARCO does not assert or offer any proof that a potential witness in this case is unwilling to appear voluntarily or that the subpoena power of the United States District Court in Colorado extends to any unwilling witness. Consequently, this factor weighs in favor of plaintiffs' forum choice. *Jackson v. Reynolds Metals Co.*, 1990 W.L. 124878 *2 (E.D. La. 1990); *Minstar, Inc. v. Laborde*, 626 F. Supp. 142, 148 (D. Del. 1985) (the court will disregard availability of compulsory process if movant fails to make a showing that witnesses are unwilling to appear); *Houk v. Kimberly-Clark Corp.*, 613 F. Supp. 923, 931 (W.D. Mo. 1985) (lack of process to compel attendance of witnesses not controlling where defendant's argument merely assumes that witnesses would not appear voluntarily); *First Nat'l City Bank v. Nanz, Inc.*, 437 F. Supp. 184, 189 (S.D.N.Y. 1975) (ability of movant to call witnesses of little significance where movant failed to suggest that witness could or would not appear at trial in the chosen forum).

3. Arco has Failed to Meet its Burden of Showing that the Cost of Obtaining Attendance of Willing Witnesses Weighs in its Favor

ARCO merely asserts, without support, that "compelling all of these Colorado witnesses to travel to Louisiana . . . would impose a substantial and unnecessary burden and financial hardship." *See* ARCO Memorandum at 20. This broad unsupported assertion should not be accorded weight by this Court.

The only ARCO witnesses likely to have knowledge relevant to the issues in this case are (1) possibly those people with personal knowledge of what ARCO knew with respect to environmental problems at the Rico site prior to Crystal's bankruptcy discharge, and possibly (2) persons with knowledge of ARCO's intent in entering into the Closing Agreement, the agreement which, on its face, allocates all ongoing obligations, including environmental cleanup costs to ARCO. These witnesses will likely be employees of ARCO, regardless of their present locations, and therefore within ARCO's control. ARCO clearly has the financial ability to bring these witnesses to Louisiana for trial—certainly more financial ability than Crystal has to bring its witnesses to Colorado—and the Court therefore should not consider the cost of bringing ARCO witnesses to trial. *See* 15 Wright & Miller, *supra* § 3851 at pp. 420-23 ("Transfer may be denied when the witnesses, although in another district, . . . are employees of a party and their presence can be obtained by that party") (citing cases).

4. A View of the Premises is not Warranted in This Case and Thus Weighs in Favor of Plaintiffs' Forum Choice

ARCO has failed to demonstrate that a view of the mine is necessary to the ends of justice, as required for consideration as a factor in favor of transfer. *Marbury-Pattillo Constr. v. Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir. 1974) (contention that it might be invaluable for the jury to make a physical inspection of the allegedly defective structure involved in a lawsuit did not show that inspection would be

"necessary to the ends of justice," and therefore it was proper to deny motion to change venue to a district where the structure was located). ARCO does not even assert that a site inspection is warranted in this case, and although ARCO recites that "many" justices find it useful to visit a site, it can cite to only one remote example. *See* ARCO's Memorandum at 21-22 ("Many Colorado justices find it useful (and even crucial) to visit the site. . . ."). A site inspection by a judge is a rare case indeed, and not even remotely warranted in this case where the two issues before the Court have to do with contract interpretation and bankruptcy discharge. Further, the actual site of the Rico property is quite remote from Denver.

5. Enforceability of a Judgment Does not Weigh in Favor of Transfer

This Court's judgment may be fully enforced on all parties to this suit. Consequently, this factor weighs in favor of upholding plaintiffs' forum choice.

6. Relative Docket Congestion Does not Weigh in Favor of Transfer

When deciding a motion to transfer venue, courts may also consider the relative docket congestion of the two courts, if significant. *Parsons v. Chesapeake & Ohio Ry.*, 375 U.S. 71, 73 (1963). This factor does not weigh in favor of transfer, and ARCO presented no proof to the contrary.

7. The People of This Community Have an Interest in the Litigation

The people of this community have at least an equal interest in this litigation as the people of Colorado. This community has an interest in the financial well-being of Crystal, a local company, and an interest in resolving any claim by ARCO that attempts to undermine the fresh start implicit in Crystal's discharge in bankruptcy given by the federal courts in this district. Consequently, this factor does not weigh in favor of transfer.

8. This Court is Able to Apply the Controlling Law in this Case

ARCO incorrectly suggests that the parties' choice of law provision in the June 17, 1980 letter agreement is an important factor supporting transfer. *See* ARCO's Memorandum at 14. Application of another state's law is accorded "little weight," especially where the law is neither complex nor unsettled. *See Houk v. Kimberly-Clark Corp.*, 613 F. Supp. 923, 932 (W.D. Mo. 1985); *Vasallo v. Niedermeyer*, 495 F. Supp. 757, 760 (S.D.N.Y. 1980). Colorado case-law regarding contract interpretation, however, is not complex or unsettled. With regard to ambiguity and parol evidence in particular, Colorado law follows the familiar principles: the court (judge) decides whether an agreement is ambiguous, and unless ambiguity is found parol evidence is excluded. *See* Affidavit of Edwin S. Kahn, Appendix, Tab K. This Court clearly has the power and the ability to apply Colorado contract interpretation principles, if necessary. To the extent federal laws, such as the Bankruptcy Code and CERCLA are involved, this Court is fully as qualified as any other federal court to decide the issues—indeed as to the bankruptcy issues relevant to this case, it is the most qualified federal court. Consequently, this factor weighs in favor of maintaining a Louisiana forum.

9. Other Practical Problems That Make Trial of a Case Easy, Expeditious, and Inexpensive Weigh in Favor of Plaintiffs' Forum Choice

a. Relative Financial Strength of the Parties Weighs in Favor of Maintaining a Louisiana Forum

In weighing the convenience of the parties, this Court may take into account the relative financial strength of the parties. *See, e.g., Houk*, 613 F. Supp. at 929 (the parties' relative financial ability to undertake a trial in any particular forum is a relevant consideration). This factor weighs heavily in favor of denying ARCO's motion.

ARCO is a multi-national, multi-billion dollar corporation with ample resources to fund a lawsuit in Louisiana. *See* excerpts from ARCO's 1994 Annual Report, Appendix, Tab L. ARCO maintains offices and regularly litigates in the Western District of Louisiana. Consequently, this lawsuit would pose no financial hardship on ARCO. By contrast, transferring this lawsuit to Colorado would impose a significant hardship on Crystal, which maintains no offices in Colorado. Crystal's financial strength is a small fraction of ARCO's. *See* excerpts from Crystal's 1994 Annual Report, Appendix, Tab M. Crystal's net income in fiscal 1994 was $2,106,000, as compared to $919,000,000 for ARCO.

b. Desire to Avoid Multiplicity of Litigation is Inapplicable in the Present Case

ARCO asserts, as a reason for transfer, that it will be "forced" to initiate another lawsuit in Colorado against parties not within the jurisdiction of this Court, *see* ARCO's Memorandum at 6, 19, even though it has been "teaming with local interests" since 1994, *id.* at 3; has successfully begun to build "a consensus to submit the voluntary cleanup plans for the Rico Site," *id.* at 4; and has launched a cleanup effort which "could well become a model" or other cleanups. *Id.* There is, however, no other pending lawsuit, and the potential parties are not identified. In order to be afforded any weight, a movant must "persuade the court that the need for third-party practice [in the alternate forum] is more than just a remote possibility." *Vasallo v. Nedermeyer*, 495 F. Supp. 757, 761 (S.D.N.Y. 1980). ARCO's mere assertion that, notwithstanding "very formative settlement negotiations with all appropriate parties," *id.* at 22, it will be "required" to file another action in Colorado if its venue transfer motion is not granted falls well short of the required showing.

Furthermore, by asserting that its counterclaim is compulsory under Rule 13(a) of the Federal Rules of Civil Procedure (*See* Answer and Counterclaim of Defendant Atlantic Richfield Company at 9, ¶ 2), ARCO has certified that its claim against Crystal and CEPCO does "not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Fed. R. Civ. P. 13(a). This case will determine the threshold issue of Crystal and CEPCO's possible liability for CERCLA reimbursement. Once resolved in this Court, the issue need never be relitigated in any other court.

C. **Transfer Would Impermissibly Shift Inconvenience to Crystal and CEPCO**

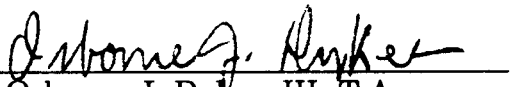
In considering the totality of the circumstances, ARCO has failed to meet its burden of demonstrating that the convenience of the parties and witnesses in the interests of justice require transfer of this case to the United States District Court for the District of Colorado. A transfer is not justified by a mere showing that the claim arose elsewhere. *E.g.*, *Kimball v. Schwartz*, 580 F. Supp. 582, 588 (W.D. Pa. 1984). At the very least, ARCO's alleged need for evidence located in Colorado is counterbalanced by plaintiffs' need for evidence in this forum. Consequently, this Court should not disturb plaintiffs' forum choice. Although this Court has broad discretion under § 1404(a), the defendant must make a convincing showing of the right to have the case transferred, since § 1404(a) provides for transfer "to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient." *Southern Investors II v. Communicator Aircraft Corp.*, 520 F. Supp. 212, 218 (M.D. La. 1981) (quoting *Van Dusen v. Barrack*, 376 U.S. 612 (1964)). "Indeed, where, as here, transfer merely serves to 'shift the inconvenience from one party to the other, the plaintiff's choice of forum should not be disturbed.'" *National Util. Serv., Inc. v. Queens Group, Inc.*, 857 F. Supp.

237, 242 (E.D.N.Y. 1994) (quoting *O'Brien v. Goldstar Tech., Inc.*, 812 F. Supp. 383, 386 (W.D.N.Y. 1993)).

CONCLUSION

Defendant has failed to show why CEPCO and Crystal are not entitled to proceed in this forum. To the contrary, this Court is the proper forum to decide the threshold bankruptcy issues in this case. Furthermore, the balance of convenience strongly favors trial of the case in this Court. Therefore, CEPCO and Crystal pray that ARCO's motion be denied, and for such other and further to which they may show themselves justly entitled.

FULBRIGHT & JAWORSKI L.L.P.



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CERTIFICATE OF SERVICE

I certify that the above and foregoing memorandum was served by mailing it by First Class, U.S. Mail, postage prepaid, to the following counsel of record on April 4, 1996 at the respective addresses indicated:

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APPENDIX

TAB

A June 1, 1978 Agreement and Amendment No. 1 thereto, and related correspondence

B June 17, 1980 letter agreement and August 27, 1980 Closing Agreement

C August 27, 1980 Acknowledgement of Termination

D October 31, 1986 Bar Order

E November 1995 Voluntary Cleanup Plan Application for the Argentine Tailings Site

F CH_2M Hill Ecology & Environment Report, dated July 29, 1985

G September 15, 1976 Proxy Statement

H Order Confirming Crystal's Plan of Reorganization

I E. Tashjian et al., *Prepacks: An Empirical Analysis of Prepackaged Bankruptcies*, 40 Journal of Financial Economics 135 (1996)

J Affidavit of Osborne J. Dykes, III

K Affidavit of Edwin S. Kahn

L Excerpts from ARCO's 1994 Annual Report

M Excerpts from Crystal's 1994 Annual Report